STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA SHUTES and JIM SHUTES,

Plaintiffs-Appellees,

v

ST. MARY'S MEDICAL CENTER OF SAGINAW,

Defendant-Appellant.

UNPUBLISHED
April 5, 2007

No. 265749
Saginaw Circuit Court
LC No. 04-054368-NO

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition in this premises liability claim. Plaintiff Patricia Shutes fell when she tripped on uneven adjacent slabs in a sidewalk. We reverse and remand for entry of summary disposition in favor of defendant.

A grant of summary disposition is reviewed de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact warranting trial. *Id.* at 357-358. Mere speculation and conjecture are insufficient to establish a genuine issue of material fact. *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Dangers that an average person of ordinary intelligence could be reasonably expected to discover upon casual inspection are open and obvious dangers. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993). A premises possessor is generally not required to protect an invitee from open and obvious dangers. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001).

The record supports the conclusion that the defect in the sidewalk was open and obvious as a matter of law. While there is some dispute as to the time of the fall, there is no dispute that it occurred during the daylight hours and that the weather was clear and sunny. Mrs. Shutes did not recall looking down at the ground while walking. However, Mr. Shutes, who had been walking with her, testified that he could see the difference between the slabs after he helped his

wife up. See *Novotney, supra*, 198 Mich App at 475 ([T]he question is not whether the [dangerous condition] could have been made more noticeable . . . , but whether [it] was noticeable in its existing condition.).

The trial court's reasoning that a question of fact existed because a security guard walked the same route often and did not see the alleged defect necessarily speculated both that the guard was in the habit of making a casual inspection while walking her normal route, and that the buckling had already occurred on one of the dates when she was assumed to have performed a casual inspection. However, mere speculation and conjecture are insufficient to defeat a motion for summary disposition. *Gen Motors Corp, supra* at 139. We also note that the security guard testified that she was not responsible for inspecting the sidewalks or expansion joints.

Moreover, differing floor levels are not normally actionable under premises liability unless special aspects are present. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (noting that "the general rule emerged" from the history of open and obvious jurisprudence in Michigan "that steps and differing floor levels were not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous"); accord *Weakley v Dearborn Heights*, 240 Mich App 382, 385-386; 612 NW2d 428 (2000), remanded on other grounds by 463 Mich 980 (2001).[1] *Bertrand* reasoned that "because steps are the type of everyday occurrence that people encounter, . . . a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety." *Id.* at 616. Similarly, a change in the level of a sidewalk in Michigan—particularly at an expansion joint—is a type of everyday occurrence that should be anticipated by a reasonable and prudent person.

There are also no special aspects about the danger presented that would render this matter actionable despite the open and obvious nature of the condition. The special-aspects doctrine provides that even though a possessor generally does not have a duty to warn of or protect an invitee from an open and obvious danger, the owner will have a duty to take reasonable precautions to prevent injury if special aspects render an open and obvious danger either "effectively unavoidable" or present "a substantial likelihood of severe injury." *Lugo, supra* at 517. Here, the condition was neither effectively unavoidable nor did it present a substantial likelihood of severe harm.

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[1] Plaintiffs argue that reliance on *Weakley* is misplaced because that case involved the removal of a portion of a public sidewalk. *Weakley, supra* at 383, 385. It is clear from *Weakley*, however, that this Court's decision was not premised on the particular facts of the case (i.e., that a portion of the sidewalk had been removed), but on the general principle that differing floor levels are ordinarily not actionable because of the open and obvious nature of the condition. Indeed, *Weakley* concludes that differing levels in a public sidewalk falls within the "differing floor levels" category noted in *Bertrand*. The reason for the varying level of the sidewalk is not dispositive. This is in keeping with *Bertrand*.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder